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No. 06-36

Supreme Court, U.S.
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In The

Supreme Court of the United States

PUBLIC AGENCY COMPENSATION TRUST (PACT),

Petitioner,

v.

COLIN PERRY ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF IN OPPOSITION

LAURIE A. YOTT
BECKETT, YOTT & MCCARTY
6130 Plumas Street, Ste. 200
Reno, NV 89519
(775) 322-3366

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

NRS 617.457 benefits Nevada police officers and fire fighters who have been so employed for at least five years prior to becoming disabled by heart disease with a conclusive presumption that their heart problems arose out of such employment. In addition to the prerequisite five years of continuous full-time employment, the officer or firefighter must have submitted to annual physicals and must have corrected any predisposing conditions such as obesity, smoking, diabetes, high cholesterol or blood pressure when ordered by the examining physician.

The question presented is whether this presumption violates the Due Process Clause of the Fourteenth Amendment.

CORPORATE DISCLOSURE STATEMENT

Respondent Employers Insurance Company of Nevada (EICN) is a private insurance corporation wholly owned by Employers Insurance Group, Inc. Employers Insurance Group, Inc. is a corporation wholly owned by EIG Mutual Holding Company, a mutual company owned by EICN's policyholders. None of these entities are publicly traded and no publicly held company owns 10% or more of their stock.

At the time of certain relevant events, EICN was an agency of the State of Nevada known as the State Industrial Insurance System (SIIS) which administered the state's workers' compensation fund. On January 1, 2000, by legislative authorization and proclamation of the Governor of Nevada, the state agency became a private mutual insurance company. Both entities will be referred to as EICN in this brief, unless otherwise specifically stated.

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I. RESPONDENT'S BRIEF IN OPPOSITION

Respondent Employers' Insurance Company of Nevada (EICN) respectfully asks this Court to deny the Petition for Writ of Certiorari filed by Petitioner Public Agency Compensation Trust (PACT). There is no compelling reason to review the state court findings.

II. STATEMENT OF THE CASE

Respondent Colin Perry was employed in law enforcement by various rural Nevada cities and counties for twenty-four years. App. IX 1704. Between July 1, 1986 and February 17, 2000 he worked as a Deputy Sheriff for the Elko County Sheriff's Department. In 1992 he suffered an episode of unstable angina or lesion in his right coronary artery producing chest pain. App. IX 1641. He underwent angioplasty and continued to work. At that time Elko County was insured by EICN's predecessor SIIS. SIIS accepted the 1992 heart claim. In 1998 Mr. Perry suffered another episode of unstable angina, but this episode involved his left coronary artery. App. IX 1641. The workers compensation coverage for Elko County had at that time been taken over by PACT. Mr. Perry made a claim for the 1998 heart incident with PACT and requested reopening of his 1992 heart claim with SIIS. PACT's rejection of the claim was overturned by a workers compensation appeals officer, under Nevada's Last Injurious Exposure Rule. Pet. 1a – 14a. SIIS's denial of reopening was affirmed. These rulings were affirmed on review by a state district court (Pet. 1b – 12b) and the Nevada Supreme Court (Pet. 1c-6c).

The dispute is whether NRS 617.457 violates due process rights of PACT under the Fourteenth Amendment.

PACT is a non-profit unincorporated association exclusively made up of self insured political subdivisions (Pet. ii), permitted by Nevada Statute to provide workers' compensation to its public employer members. PACT is not entitled to assert a federal due process claim because the Fourteenth Amendment was written to protect individual rights, as opposed to collective or structural rights, and does not apply to a claim by political subdivisions against the state that created them.

Even if PACT is found to have standing to bring a due process challenge, the statute stands up to constitutional scrutiny. The constitutionality of occupational health presumptions have been upheld by this Court where they bear a rational relationship to a legitimate governmental purpose. The Nevada Supreme Court acknowledged the legislative history showed police officers and firefighters are at an increased risk of developing heart disease because of chronic stress on the job, and could have enacted the statute to encourage officers to remain in public service or to eliminate costly "battles-of-the-experts" in proving causation. Pet. 4c.

A presumption of constitutionality applies, and PACT has not met its burden of proving NRS 617.457 is unconstitutional. The fact the Nevada Legislature decided to resolve doubts in favor of police officers and firefighters regarding the causal connection between heart disease and employment does not mean it was irrational to do so. Conflicting medical evidence regarding a causal connection between the stress incidental to police work and heart disease was presented to the Nevada Legislature, and to the administrative court below in connection with the Perry claim. See, e.g., App. IX 1661-1703 and App. IX

1629-1660, 1724-1785; App. VIII 1360-1573, 1574-1594, 1595-1601; App. X 1786-2019; App. XI 2027-2087.

The Nevada Legislature did not leave the political subdivision employers without recourse in these heart claims. Strict prerequisite conditions must be met before the presumption becomes conclusive which provide the public employers a defense to the heart claims by officers. The officer must establish at least five years of uninterrupted full time service in the law enforcement capacity. He or she must also have undergone annual physicals arranged by the employer, and have corrected any conditions identified by the examining physician that would predispose him or her to heart disease. They could be required to undertake corrective health measures such as quitting smoking, losing weight, controlling diabetes or high blood pressure and/or reducing cholesterol.

Finally, PACT attempts to show fiscal impact by an article in a Las Vegas newspaper that was not properly admitted into the record. That article was published before a 2005 Nevada Supreme Court case that significantly reduced the potential workers compensation liability in many of these police and fire heart disease cases. Any officer who otherwise qualifies but becomes disabled from the heart disease after retirement will only receive medical treatment and not wage replacement compensation benefits.

It is respectfully submitted this Court should deny PACT's Petition for Writ of Certiorari.

III. REASONS FOR DENYING THE WRIT

A. PACT DOES NOT HAVE STANDING TO BRING A FEDERAL DUE PROCESS CHALLENGE

PACT exists by virtue of Nevada statutes which enable public entities to set up unincorporated nonprofit associations for the purpose of providing self insured workers' compensation to their employees. See, e.g., NRS 616A.055, 616B.350. PACT's membership is exclusively made up of Nevada cities, counties and towns. Pet. ii, n.1. At the time of his 1998 heart incident, Mr. Perry was a Deputy Sheriff with Elko County. Pet. 1. The County and its Sheriff's Department cannot claim a violation of due-process rights under the Fourteenth Amendment by virtue of the application of a Nevada statute. *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933), *Trenton v. New Jersey*, 262 U.S. 182 (1923) "[M]unicipalities and counties may not sue a state for alleged violations of the Fourteenth Amendment, because ... that Amendment 'was written to protect individual rights, as opposed to collective or structural rights.'" *Board of Cnty. Com'r of Sweetwater v. Geringer*, 297 F.3d 1108, 1116 n.1 (10th Cir. 2002) [quoting from *Branson School District R-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998). Citing *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933)].

PACT should be considered a public entity for purposes of this challenge because it was created to benefit public employers by allowing them to share the costs of self-funding workers compensation plans. See, generally, *Matter of Passino v. Jefferson-Lewis*, 277 A.D.2d 1028, 716 N.Y.S.2d 229 (2000). PACT exists only to benefit public

employers in their effort to provide workers' compensation to their employees, and therefore it is more akin to a public entity than a private insurance company. There is no reason to allow a political subdivision to get around the state's immunity from Fourteenth Amendment violation claims, simply by banding together with other public entities into a self-insured, unincorporated association. There is no reason to give the group of public entities making up the PACT self insured association better rights than those available to a self insured public entity standing alone.

PACT lacks standing to bring this due process challenge.

B. NO COMPELLING REASON TO REVIEW

PACT has not presented any compelling reason for discretionary review of the state court findings, as required by Supreme Court Rule 10.

Statutes are presumed to be constitutional. *INS v. Chadha*, 462 U.S. 919, 944, 103 S.Ct. 2764 (1983). As such "the party challenging the statutory . . . scheme . . . bears the burden of demonstrating its unconstitutionality." *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 198 (2001).

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Federal courts defer to state court interpretations of state statutes. See, e.g., *Arizonans for Official English v. Arizona*, 530 U.S. 43, 48, 117 S.Ct. 1055, 1059, 137 L.Ed.2d 178, 181 (1977). Factual

findings receive similar deference *Hernandez v. New York*, 500 U.S. 352, 364-369, 111 S.Ct. 1859, 1968-1870, 114 L.Ed.2d 395, 409-412 (1991). All arguments in support of the Petition would require this Court to review and overturn the state court's factual findings and interpretations of state workers' compensation law. When considering the validity of legislation which is under constitutional attack, the state enjoys a wide range of discretion to make reasonable classifications for enacting laws over matters within its jurisdiction. *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

As indicated by the Nevada Supreme Court below, the legislative history of NRS 617.457:

> . . . suggests that police officers and firefighters are at an increased risk of developing heart disease because of chronic stress on the job. As a result, the Legislature could have enacted NRS 617.457 for the purpose of encouraging firefighters and police officers to remain in public service or to eliminate costly "battles of the experts" used to prove or disprove a causal connection between firefighting and police work and heart disease.

Pet. 4c. The Nevada Court therefore concluded a rational basis exists for NRS 617.457 and that the statute is reasonably related to achieving a legitimate government purpose. Pet. 3c and 4c. PACT cannot accordingly overcome the statute's presumption of constitutional validity.

A very similar statute was found constitutionally justified by the California Supreme Court. *City and County of San Francisco v. Workers' Compensation Appeals Bd.*, 22 Cal.3d 103, 583 P.2d 151, 148 Cal.Rptr. 626 (1978). Noting the pronounced dichotomy in medical opinion regarding heart disease in the police work context, the

California Court believed "substantial justice" and equal treatment were widely thwarted in practice because the compensability of similar heart attacks varied fortuitously on the basis of which competing school of medical thought administrative officials . . . chose to credit in a particular case." *Id.*, at 115.[1] That Court justified compensability of cases involving pre-existing heart di ease by noting aggravations by work exposure are covered. *Id.*, at 115-116. Nevada workers' compensation law also covers occupational aggravations of pre-existing disease. NRS 617.366.

Not every conclusive presumption is constitutionally infirm. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 33-34 (1976) this Court found a rational connection supporting employment duration based conclusive presumptions relating to black lung disease, as a result of conflicting medical evidence on the issue considered by the legislature. Nevada's legislature also considered the well-documented debate relating to whether stress resulting of law enforcement or fire fighting work causes heart disease. See, e.g., IX App. 1660-1703. The fact such medical

[1] As acknowledged in *Robertson v. North Dakota Wkr. Comp. Bur.*, 616 N.W.2d 844, 854 (ND 2000): "Other courts have recognized a split in the medical community about the causal relationship between law enforcement employment and heart disease, and have said the enactment of similar law enforcement presumptions represents a legislatively adopted premise that work stress of a law enforcement officer causes heart disease. See, *City and County of San Francisco v. Workers' Comp. Appeals Bd.*, 583 P.2d 151, 155-56 Cal. (1978); *Stephens v. Workmen's Comp. Appeals Bd.*, 97 Cal.Rptr. 713, 715 (Cal.Ct.App. 1971); *Swanson v. City of St. Paul*, 526 N.W.2d 366, 368 (Minn. 1995); *Linnell*, 305 N.W.2d at 601; *Schave v. Department of State Police*, 227 N.W.2d 278, 282 (Mich. 1975); *Fairfax County Fire and Rescue Servs. v. Newman*, 281 S.E.2d 897, 900 (Va. 1981)."

debate regarding the heart disease continues to exist today was shown by the conflicting medical opinions and scientific articles presented to the administrative appeals officer in Mr. Perry's hearing, below. See, e.g., App. IX 1629-1660, 1724-1785; App. VIII 1360-1573, 1574-1594, 1595-1601; App. X 1786-2019; App. XI 2027-2087.

PACT cites a 1971 Connecticut decision, *Ducharme v. City of Putnam*, 285 A.2d 318 (Conn. 1971) for the proposition the heart disease presumption is a "gift or special benefit" to police and firefighters, and as such must be done by legislation outside of the Nevada Industrial Insurance Act. Pet. 10. Although Connecticut took that route and indistinguishable benefits were ultimately enacted and constitutionally upheld,[2] there is no reason to force this distinction as to form rather than substance on Nevada.

The public employers of police officers and firefighters retain defenses to the heart disease claims, based upon the prerequisites to the applicability of the presumption. The presumption of occupational heart problems does not apply unless the officer has at least five continuous, full time years of service before the manifestation of the disability. NRS 617.457(1). During the officer's entire tenure of employment he or she must also have submitted to annual physicals of the heart arranged by the employer. NRS 617.457(3). The statute also requires the officer to correct predisposing conditions which led to the heart disease, where ordered by the examining physician. NRS 617.457(6). The occupational connection between the

[2] *See, Bakelaar v. West Haven*, 475 A.2d 283 (1984), citing *Grover v. Manchester*, 357 A.2d 922, appeal dismissed, 423 U.S. 805 (1975).

service and the heart problems is therefore narrowed considerably by these prerequisites.

C. PACT'S FISCAL IMPORT ARGUMENT IS FLAWED

PACT attempts to demonstrate a compelling fiscal impact as a result of figures given in a July 31, 2005 Las Vegas newspaper article discussing the statute.[3] Subsequent to that article, however, on October 6, 2005, the Nevada Supreme Court came down with *Howard v. City of Las Vegas*, 121 Nev. Adv. Op. No. 70, 120 P.3d 410 (2005) which will significantly reduce the extent of public employer fiscal liability in these claims. *Howard* holds that officers who do not become disabled by their heart disease until after retirement are not entitled to wage replacement or other money compensation benefits. Such recipients are only entitled to medical treatment through their workers' compensation claims. The fiscal impact of the legislation is therefore not accurately shown by the July 2005 newspaper article.

PACT's complaint regarding the fiscal impact also belies the fact it had notice of the heart legislation at the time the association of public entities was formed. The law enforcement heart presumption has been in effect since 1989, while the enabling legislation for self insured groups of public employers was not enacted until 1993. PACT

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[3] Consideration of the facts in this article may be procedurally inappropriate, since it was not in the record on appeal. The article was inappropriately contained in PACT's motion for en banc consideration before the Nevada Supreme Court. NRAP 40A(c).

should have been assessing its group members accordingly and is presumably prepared for future fiscal impact.

IV. CONCLUSION

It is respectfully submitted the Petition should be denied.

Respectfully submitted,

LAURIE ALEXANDRA YOTT
BECKETT, YOTT & MCCARTY
6130 Plumas Street, Ste. 200
Reno, NV 89519
(775) 824-8833
Attorneys for Respondent